STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

NAPA COUNTY FEDERATION OF TEACHERS, AFT LOCAL 4067,	)	
Charging Party,	)	Case No. SF-CE-596
v.	)	PERB Decision No. 282
NAPA COUNTY OFFICE OF EDUCATION,	)	February 14, 1983
Respondent.	)	

Appearances; Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg & Rogers) for Napa County Federation of Teachers, AFT Local 4067.

Before Gluck, Chairperson; Tovar and Jaeger, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Napa County Federation of Teachers, AFT Local 4067 (Union) of a hearing officer's dismissal of its charge alleging that the Napa County Office of Education (County) violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (Act) by refusing to negotiate with the Union over the wages, hours, and working conditions of a newly-created position.

The hearing officer found that the County had no duty to bargain over the wages, hours, and working conditions of a newly-created classification pending the placement of that classification in the bargaining unit pursuant to the Public

Employment Relation Board's unit modification procedures.[1] We find that the unfair practice charge was rendered moot by PERB's resolution of the issue in a representation hearing resulting from the union's later filing of a unit modification petition.

PROCEDURAL HISTORY

On April 28, 1981, the County announced the creation of a new position, that of program specialist. There were to be three such positions, which were to be filled by July 1, 1981. After the April 28 announcement and several meetings between the parties, the County informed the Union that these positions would be excluded from the unit as supervisory. Later, the County changed its position, arguing that these employees were managerial.

On September 15, 1981, the Union filed an unfair practice charge alleging that the County violated subsections

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[1]PERB rules are codified at title 8, California Administrative Code, section 31001 et seq. Prior to September 20, 1982, the rules governing unit modification procedures were located at section 33260 - 33265. Former PERB rule 33261 provided in relevant part:

> (a) A recognized or certified employee organization may file with the regional office a petition for unit modification . . . :
>
> . . . . . .
>
> (3) To add to the unit new unrepresented classifications or positions created since recognition or certification of the current exclusive representative;

3543.5(a), (b) and (d) of the Act. On October 22, 1981, the Union amended its complaint, adding a subsection 3543.5(c) allegation and deleting the subsection 3543.5(d) violation. The amended charge alleges in relevant part:

> Prior to establishing, announcing, and filling the position of "program specialist," the County Office of Education failed to request a meeting to negotiate . . . these positions. When requested, the County office failed to respond in writing to the NCFT. Upon further request to the County Office of Education in meetings with Associate Superintendent Edward Henderson, the County continued to refuse to meet and negotiate wages, hours, and working conditions for program specialists. Program specialists by virtue of being certificated non-supervisory, non-management personnel remain part of the recognized unit in Napa County Office of Education until the PERB approves a unit modification petition from either the employer, or jointly from the employer and exclusive representative. Thus, the employer has a legal responsibility to meet and negotiate with the exclusive representative over these issues.

The hearing officer dismissed the complaint with leave to amend, finding that newly-created positions remain outside of the unit until the exclusive representative files a unit modification petition and the positions are placed in the unit following a representation hearing.

On October 23, 1981, subsequent to the filing of the above-noted unfair practice charges, the Union filed a unit modification petition to add the classification of

program specialist to the certificated unit. On December 24, 1982, after a hearing in Case No. SF-UM-217, a PERB hearing officer ordered that the program specialist classification be added to the certificated unit. That decision became final on January 13, 1983.

DISCUSSION

In Amador Valley Joint Union High School District (10/02/78) PERB Decision No. 74 and subsequent decisions, the Board established a standard for determining whether an issue has become moot. Thus, where the essential nature of a complaint is lost due to the superseding conduct of the parties, it is rendered moot. Amador Valley, supra; State of California, Department of Transportation (3/17/81) PERB Decision No. 159-S. However, where issues persist beyond the specific case, despite the fact that the parties may have reached a private resolution of the matter, the case is not rendered moot. Healdsburg Union High School District (6/19/80) PERB Decision No. 132.

Applying these principles to the present case, we find that the Union's unfair practice charge was rendered moot by the subsequent filing of a unit modification petition and the placement of the program specialist classification in the certificated unit.

Although the Union's unfair practice charge is ambiguous, it may be fairly read to allege that the parties' recognition

agreement automatically placed new certificated employees in the unit and, that, by refusing to negotiate over the wages, hours, and working conditions of newly created certificated positions, the County breached this agreement with the Union, thereby violating the duty to bargain in good faith. The Union's unit modification petition, on the other hand, is premised on the theory that a "new unrepresented classification" should be prospectively placed in the bargaining unit (former PERB rule 33261(a)(3)). Thus the Union's unit modification petition assumes that the County had no duty to negotiate prior to the resolution of PERB's unit modification procedure. The Union's subsequent filing of a unit modification petition, inherently inconsistent with the position it took in the earlier unfair practice charge, and the resolution of the employee placement issue through the modification proceeding, effectively renders the unfair practice charge moot. Accordingly, it is dismissed. Amador Valley, supra; Department of Transportation, supra; Healdsburg, supra.

ORDER

After a review of the entire record in this case, the Public Employment Relations Board ORDERS that the unfair practice charge in Case No. SF-CE-596 is hereby DISMISSED.

Gluck, Chairperson, and Tovar, Member, joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA

NAPA COUNTY FEDERATION OF TEACHERS, AFT LOCAL 4067, Charging Party, v. NAPA COUNTY OFFICE OF EDUCATION, Respondent.	)	Unfair Practice Case No. SF-CE-596 NOTICE OF REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF CHARGE WITH LEAVE TO AMEND

NOTICE IS HEREBY GIVEN that no complaint will be issued in the above-captioned unfair practice charge and that it is hereby dismissed with leave to amend within twenty (20) calendar days after service of this Notice pursuant to PERB regulation, section 32630 (California Administrative Code, title 8, part III).

The charge is dismissed on the grounds that it fails to allege facts sufficient to state a prima facie violation of the Educational Employment Relations Act (section 3540 et seq. of the Government Code, hereafter EERA).

DISCUSSION

This charge originally was filed on September 18, 1981, amended on October 26, 1981 and amended again on November 3, 1981. The basic allegation remained unchanged through the various amendments. In essence, it is contended that the Napa County Office of Education on or about April 28, 1981 announced

three vacancies for the position of "program specialist." These newly created positions were to come into existence on July 1, 1981. Shortly after the creation of the positions was announced, the Napa County Federation of Teachers discovered that the employer intended to exclude the positions from the negotiating unit. The Federation is the exclusive representative of the employer's certificated employees.

Initially, the charge alleges, the employer contended that these positions should be excluded from the unit as being supervisory. Later, however, the employer changed its position to the contention that the positions should be excluded as being management. This change in position occurred after the Federation met with the employer and contested the designation of the program specialists as supervisors. It is alleged that the wages, hours and working conditions of the three employees have been fixed unilaterally by the employer without respect to the contract between the parties. Furthermore, the Federation continues, the employer has refused to negotiate about the wages, hours and working conditions for the three employees.

The Federation contends that by these actions the employer has violated Government Code section 3543.5(a), (b) and (c). The Federation bases this contention on the theory that it is the representative of all certificated employees. It disputes the employer's contention that the program specialist position

is either supervisory or managerial and avers that the position therefore must be in the negotiating unit.[1]

Under these allegations, it is concluded that the employer could not have violated the Educational Employment Relations Act by unilaterally setting the wages, hours and working conditions for program specialists because the position never was in the negotiating unit. The position is newly created and could not have been within the contemplation of the parties at the time they established the unit. PERB rules for unit modifications provide that an employee organization may file a unit modification petition:

> (2) To add to the unit classifications created since recognition or certification of the current exclusive representative.[2]

The rules also provide that an employee organization, an employer or both jointly may file a unit modification petition:

> (1) To delete classifications no longer in existence or which by virtue of changes in circumstances are no longer appropriate to the established unit.[3]

The rules further provide that:

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[1]In a separate proceeding, the Federation on October 23, 1981 filed a petition for unit modification with the PERB's San Francisco Regional Office. This petition asks that the position of program specialist be added to the unit. In that petition, the Federation states that the position of program specialist was created as a result of legislation enacted in 1980.

[2]Cal. Admin. Code, title 8, section 33261(a)(2).

[3]Cal. Admin. Code, title 8, section 33261(b)(l).

> No unit modification may be made by any procedure other than that contained in this Article.[4]

The rules thus set out a procedure for changing the status quo. If new jobs have been created, they can be added to the unit only by a petition for unit modification. If existing jobs are no longer appropriate for the unit, they can be removed only by a petition for unit modification. Newly created positions remain outside the unit until the exclusive representative positions for them and the PERB brings them into the unit through the unit modification procedure. Similarly, existing jobs remain within the unit until the PERB removes them upon the request of a party or parties.

Thus the employer had no obligation to meet and negotiate about the position of program specialist. It was a newly created position and it remains outside the unit until the Federation petitions for it and the PERB has concluded that the position belongs in the unit. An employer has unfettered authority to set wages, hours and working conditions for positions not within the negotiating unit. See generally, Chemical Workers v. Pittsburgh Plate Glass Co. (1971) 404 U.S. 157 [78 LRRM 2974]. For these reasons, the present charge must be dismissed.

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[4]Cal. Admin. Code, title 8, section 33260.

This refusal to issue a complaint and dismissal of the charge with leave to amend is made pursuant to California Administrative Code, title 8, section 32630(a). If charging party chooses to amend, the amended charge must be filed with the San Francisco Regional Office of the PERB within twenty (20) calendar days (section 32630(b)). Such amendment must be actually received at the San Francisco Regional Office of the PERB before the close of business (5:00 p.m.) on November 30, 1981, in order to be timely filed (section 32135).

If charging party chooses not to amend the charge, it may obtain review of this refusal to issue complaint and dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of the Notice (section 32630(b)). Such appeal must be actually received by the executive assistant to the Board before the close of business (5:00 p.m.) on November 30, 1981, in order to be timely filed. Such appeal must be in writing, must be signed by the charging party or its agent, and must contain the facts and arguments upon which the appeal is based (section 32630(b)). The appeal must be accompanied by proof of service upon all parties (sections 32135, 32142 and 32630(b))).

Dated: November 9, 1981

WILLIAM P. SMITH
Chief Administrative Law Judqe

Ronald E. Blubaugh
Hearing Officer